

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICA- )  
TION FOR BENEFICIAL WATER USE )  
PERMIT NO. G41585-s41E BY ) FINAL ORDER  
WILLIAM AND CHARLOTTE DUNKS AND )  
EMMETT J. AND MARGY B. McCAULEY.)

\* \* \* \* \*

On July 14, 1988, the Proposal for Decision in this matter was entered. The Hearing Examiner found that the Objectors' existing water rights would be adversely affected and recommended that Application for Change of Appropriation Water Right No. G41585-s41E be denied. Applicants Emmett J. and Margy B. McCauley filed exceptions to the Proposal and requested oral arguments to be held pursuant to Mont. Code Ann. § 2-4-621(1). An oral argument hearing was held before the Assistant Administrator of the Water Resources Division on October 12, 1988, in Helena, Montana. Present at the hearing were Ed McCauley, son of the Applicant, and John E. Thorson, attorney for the Applicant, Robert T. Cummins, attorney for Objectors' Estates of Eve Twohy and William Twohy, John Carey Ranch and Carey Brothers Partnership, and Tom Carey Cattle Company.

The Applicants excepted to the admission of Objectors' Twohy/Carey Exhibit #10, which is a document dated December 16,

1987, prepared by Lyle Ward summarizing flows on the Boulder River as measured November 24, 1987. The Applicants assert that the exhibit is irrelevant to any issue before the Department. I agree that measurements during the non-irrigation season are not particularly relevant in this proceeding. However, the error, if any, is harmless. There is no reason that the exhibit should be stricken from the record.

A brief summary of the Applicant's proposed change will clarify the following discussion of exceptions. The proposed change will relocate the point of diversion (POD) and place of use (POU) of water right No. G41585-41E some 15 miles down the Boulder River. Half of the water historically diverted at the old POD would be dedicated to the stream to match historic return flows from the old POU. Of the remaining half of the water, the Hearing Examiner found that 15% would go to natural stream loss, leaving 85% that, in theory, would reach the new POD.

The Applicants except to the statement in Finding of Fact 12 that approximately 15% of the water passing the old POD is lost due to natural stream loss. The Applicants assert that the stream loss would be less during spring runoff. I agree that the Department's report in this matter generally confirms that higher losses occur with lower flows, and that the 15% loss occurs at low flow. However, in weighing possible adverse effects to other appropriators, the Hearing Examiner properly focused on low flow periods and correctly found that the Applicant would have to compensate for a 15% loss during those periods. It would be the

Applicant's burden to present data showing specifically how much his loss compensation would be reduced in higher flow periods.

Much of the argument at this stage concerns whether the USGS gage at the Boulder Bridge, which is between the old and new POD's, can be used to show water availability at the new POD. In Conclusion 10, the Examiner found that:

even if there were water at the bridge, it is still not certain whether Applicants would be diverting water which Dunks could formerly have obtained, for water flowing by the Boulder River bridge could be destined to supply an appropriator with a water right senior to Dunks. Just because the Dunks' water would not be diverted at the original point of diversion is not a guarantee that such water will arrive at the new point of diversion.

In other words, because there are senior rights between the bridge and the new POD, water at the bridge could go to the seniors rather than the Applicant. Thus, the bridge gage can not be used to show water available for the Applicant. The Applicant's argument that most of the water at the bridge comes from the stretch of river where the old POD was located, while supported by the record, does not make Conclusion 10 invalid.

Conclusion of Law 11 recites the principle that an appropriator may not alter stream conditions to the detriment of junior appropriators. The Applicants assert that this Conclusion may be a correct statement of the law but is not germane to the present case. I disagree. If the Applicant appropriates at the new POD when upstream seniors are using the water passing the old POD, some of the water the Applicant takes could be from

tributaries entering below the old POD - water to which the Applicant was not historically entitled, and which was used by junior appropriators. Thus, the principle cited forms the legal basis for denying the proposed change.

As stated in Conclusion 12, the change was denied because the Applicant could divert at the new POD, water not historically available at the old POD. Contrary to the Applicant's exception, the problems the Hearing Examiner found with this change are not "hypothetical," nor is the Department requiring proof to an "absolute certainty." The complexity in this case was introduced by the Objectors, and arises from the physical conditions on a heavily appropriated river. It is inherently difficult to prove no adverse effect resulting from moving a POD 15 miles down-river, when there are numerous intervening appropriators both junior and senior, as well as intervening tributaries. In such cases the Department must require an Applicant to anticipate and address all reasonably possible adverse effects.

Finally, the Applicants assert that the Department has available to it an array of conditions that could be imposed on the transfer to safeguard junior appropriators. The Department does have authority, pursuant to Mont. Code Ann. § 85-2-402(7), to impose conditions on permits and change authorizations. In this case, however, the Hearing Examiner concluded that based on the evidence presented "no condition fully protective of water formerly unavailable to Dunks can be imposed." Again, it is the Applicant's burden to show an adequate plan of operation to



safeguard against adversely affecting other appropriators. The Hearing Examiner was unable to impose protective conditions because there was insufficient evidence in the record to suggest what conditions might be effective.

I find no error in the Hearing Examiner's Proposal. Accordingly, all Findings of Fact and Conclusions of Law of the Hearing Examiner in this matter are adopted and incorporated in the Order by reference. Based upon the Findings and Conclusions, all files and records herein, and exceptions and oral argument hearing, the Department of Natural Resources and Conservation makes the following:

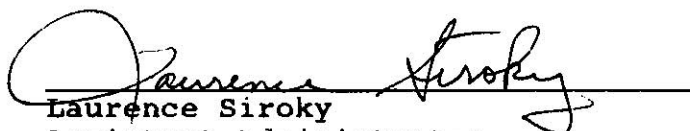
O R D E R

Application for Change of Appropriation Water Right No. G41585-s41E is denied without prejudice.

N O T I C E

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

DATED this 4 day of May, 1989.

  
Laurence Siroky  
Assistant Administrator  
Department of Natural Resources  
and Conservation  
Water Resources Division  
1520 East Sixth Avenue  
Helena, Montana 59620-2301  
(406) 444-6816

CERTIFICATE OF SERVICE BY MAIL

I, IRENE V. LaBARE, Legal Secretary for the Water Resources Division of the Department of Natural Resources and Conservation, hereby certify that on the 9<sup>th</sup> day of May, 1989, I mailed a true and correct copy of the foregoing FINAL ORDER, postage prepaid, to the following parties:

Emmett J. & Margy McCauley  
P. O. Box 25  
Boulder, MT 59632

Estates of Eve Twohy  
and William A. Twohy  
1 North Last Chance Gulch  
Helena, MT 59601

Robert L. & Mary Anderson  
P. O. Box 45  
Boulder, MT 59632

William & Charlotte Dunks  
2413 Kossuth  
Butte, MT 59701

John Thorson, Esq.  
DONEY & THORSON  
P. O. Box 1185  
Helena, MT 59624

Stuart F. Lewin - Trustee  
P. O. Box 649  
Boulder, MT 59632

Tom Carey Cattle Company  
P. O. Box 47  
Boulder, MT 59632

John Carey Ranch &  
Carey Brothers  
2050 Highway 69  
Boulder, MT 59632

  
Irene V. LaBare - Legal Secretary

BEFORE THE DEPARTMENT  
OF NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR CHANGE OF APPROPRIATION WATER ) PROPOSAL FOR DECISION  
RIGHT NO. G41585-41E BY WILLIAM L. )  
AND CHARLOTTE M. DUNKS )

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on January 6, 1988, in Helena, Montana. The record was left open at the end of the hearing for closing briefs by the parties. The record closed on March 28, 1988.

Appearances

Emmett J. and Margy B. McCauley, assignees of the original Applicants, William L. and Charlotte M. Dunks (see Finding of Fact 8, infra), were represented by John Thorson, attorney at law. Emmett J. McCauley appeared in person.

--Ed McCauley, son of Emmett J. McCauley, appeared as witness for McCauleys.

--William L. Dunks appeared as witness for McCauleys.

--Charlotte Dunks appeared as witness for McCauleys.

--Jack Stults, formerly a water rights specialist with the Department of Natural Resources (hereafter, "department" or "DNRC") Water Right Bureau Helena Field Office, appeared as witness for McCauleys.

**CASE # 41585**

Objector Estates of Eve Twohy and William A. Twohy, Objector Tom Carey Cattle Co., and Objector John Carey Ranch and Carey Brothers Partnership (hereafter, referred to individually, or collectively as "Twohy/Carey"), all appeared by and through Counsel Robert T. Cummins, attorney at law.

--Lyle Ward, of the Soil Conservation Service at Whitehall, Montana, appeared as witness for above-said objectors.

--Pat Carey, an employee of Carey Ranches, appeared as witness for above-said objectors.

--James Franke, an irrigator in the Boulder area, appeared as witness for above-said objectors.

--Tom Carey, owner of Tom Carey Cattle Co., appeared as witness for above-said objectors.

Objector Robert L. and Mary K. Anderson appeared by and through afore-said Robert L. Anderson.

Objector Stuart Lewin, Trustee, did not appear in person or by representative.

James Beck, agricultural specialist with the DNRC Water Rights Bureau Helena Field Office, appeared as DNRC staff witness.

#### Exhibits

The Applicants offered 17 exhibits for inclusion in the record.

Administrative (judicial) notice was taken of the Final Order of Condemnation in State of Montana vs. Dunks, Nos. 5126 and 5113 (Mont. 5th District, February 22, 1987). Applicants' Exhibit 1 is a copy of said Final Order.

8 Applicants' Exhibit 2, photocopy of a Statement of Claim for Existing Water Right No. 41585-41E by William and Charlotte Dunks (also referred to herein as "Dunks"), was admitted without objection.

Applicant's Exhibit 3, a copy of the Boulder River Temporary Preliminary Decree Abstract of Water Right for owner William L. Dunks, was admitted without objection.

Applicants' Exhibit 4, a photocopy of a Stipulation regarding Water Right Claim 41585-41E entered into by DNRC and Dunks, was introduced for inclusion in the record, and it was also moved that administrative notice be taken thereof. Both the motion to take administrative notice, and the motion to admit the stipulation as an exhibit proper, were taken under advisement.

8 The Hearing Examiner hereby denies the motion to take administrative (judicial) notice, as the document does not constitute an official act of a governmental body, nor does it otherwise constitute law of which administrative (judicial) notice may be taken. However, the Hearing Examiner hereby admits same into evidence as an exhibit proper, as it constitutes an amendment to the Dunks' Statement of Claim of Water Right underlying this Application for Change, see Case No. 43BJ-77, Montana Water Courts, Yellowstone Division, November 6, 1987, p. 13, and is thus relevant to these proceedings as prima facie proof of the extent of the Dunks Water Right. MCA §85-2-227.

8 Applicants' Exhibit 5, a map of the Boulder River Valley with annotations prepared by Jim Beck, was admitted without objection.

8 Applicants' Exhibit 6, a photograph of the vicinity of the original Dunks diversion, was admitted over the objection of Objector Twohy-Carey.

Applicants' Exhibit 7, three photographs of area of the "Rogers Ditch" diversion, was admitted without objection.

Applicants' Exhibit 8, a photograph of USGS gauge at Boulder, Montana, was admitted without objection.

Applicants' Exhibit 9, a photograph of the Little Boulder River 100 yards from its confluence with the Boulder River, was admitted without objection.

Applicants' Exhibit 10, a photograph of the headgate of the Anderson-McCauley ditch, was admitted without objection.

8 Applicants' Exhibit 11, a photograph of the Carey Ditch where it goes under Highway 281, was admitted without objection.

Applicants' Exhibit 12, a photograph of the headgate at the proposed point of diversion, was admitted without objection.

Applicants' Exhibit 13, three photographs of the Boulder River, was admitted without objection.

Applicants' Exhibit 14, a photograph of the Wickham Ditch where it enters McCauley's property, was admitted without objection.

Applicants' Exhibit 15, a memorandum from John Stults to Faye McKnight, dated January 15, 1987, was admitted without objection.

6 Applicants' Exhibit 16, a large sheet containing calculations made by Jim Beck at the hearing, was introduced at the hearing. The exhibit received objection as to relevance. The objection is hereby overruled and the exhibit admitted, as the calculations are relevant to the issue of how much water can be diverted at the new point of diversion without adversely affecting the Objectors.

Applicants' Exhibit 17, a large sheet containing calculations made by Jim Beck at the hearing, was introduced at the hearing. The exhibit received objection as to relevance. The objection is hereby overruled and the exhibit admitted as the calculations are relevant to the issue of how much water can be diverted at the new point of diversion without adversely affecting the Objectors.

Objector Anderson offered no exhibits for inclusion in the record.

Objector Twohy/Carey offered 22 exhibits for inclusion in the record.

Objector Twohy/Carey Exhibit 1, copies of the Notice of Final Decision and the Final Decision, and the original transcript of the hearing In the Matter of Application for Beneficial Water Use Permit No. 14956-q41E and Application for Change of Application Right No. 19230-c41E by Thomas H. Boone, Trustee, was admitted without objection.

Objector Twohy/Carey Exhibit 2, eight photocopied pages of Dunks' Statement of Claim No. 41585-41E and addenda thereto, was admitted without objection.

Objector Twohy/Carey Exhibit 3, seven photocopied pages of Dunks' Statement of Claim No. 41584-41E and addenda thereto, was admitted without objection.

Objector Twohy/Carey Exhibit 4, one page entitled "Notes for William Dunks", was admitted without objection.

Objector Twohy/Carey Exhibit 5, a photocopy of an aerial photograph (1947) marked with red ink, was admitted without objection.

8 Objector Twohy/Carey proposed Exhibit 6, a certified copy of the Findings of Fact and Conclusions of Law issued by the Water Court in McCauley vs. Schreder, Cause No. 6722, (Montana Water Court in and for the 5th Judicial District, October 6, 1980), received objection as irrelevant to any determination to be made in this case. The objection is hereby sustained and admission denied.

Objector Twohy/Carey Exhibit 7, a copy of an Order Modifying Temporary Restraining Order in Carey v. McCauley, Cause No. 7999 (Mont. 5th District, July 15, 1987) was admitted without objection.

8 Objector Twohy/Carey proposed Exhibit 8, a photocopy of a handdrawn map pertaining to Application 41E-W094138, was introduced. Objection was made that the map was irrelevant as it pertained to lands proposed to be irrigated under a different change application by McCauleys, which application had not been acted upon by the department. Objector Twohy/Carey attempted to establish relevance by stating that it was trying to show that the proposed place of use hereunder is larger than 65 acres. However, no foundation was laid as to how a map, appended to another separate application, is illustrative of the size of the proposed place of use hereunder. Therefore, admission was denied.

Objector Twohy/Carey Exhibit 9, a photocopy of a map detailing private irrigation as of 1956 in the vicinity of Boulder, Montana, was admitted without objection.

8 Objector Twohy/Carey Exhibit 10, a document dated December 16, 1987 prepared by Lyle Ward regarding Summary of Flows on Boulder River as measured on November 24, 1987, was introduced. Objection as to its relevance was made. The objection was overruled, and the exhibit admitted.



8 Objector Twohy/Carey Exhibit 11, a photocopy of an aerial photograph (1987) marked with blue ink, was admitted without objection.

Objector Twohy/Carey Exhibit 12, a document prepared by Pat Carey purporting to show water rights on the Boulder River, with priority dates older than 1882, and with points of diversion between the original Dunks point of diversion and Cold Springs, was admitted without objection.

Objector Twohy/Carey Exhibit 13, 19 photocopied pages of abstracts of the pre-1900 water rights of Carey's, Twohy's and Anderson as set forth in the Boulder River Temporary Preliminary Decree, was admitted without objection.

8 Objector Twohy/Carey Exhibit 14, 19 photocopied pages of records of river and climatological observations taken at the Boulder River Station at Boulder, Montana, in 1985, 1986 and 1987, was admitted without objection.

Objector Twohy/Carey Exhibit 15, photocopies (2 pages) of the Climatological Summary for Boulder, Montana, 1951-1980, was admitted without objection.

Objector Twohy/Carey Exhibit 16, a photocopy of a worksheet entitled "Precipitation at Boulder", was admitted without objection.

Objector Twohy/Carey Exhibit 17, a list of certain water rights with points of diversion below the Wickham Ditch headgate, was admitted without objection.

8 Objector Twohy/Carey Exhibit 18, a photocopy of an aerial photograph (1955) of the area of the proposed place of use, was admitted without objection.

8 Objector Twohy/Carey Exhibit 19, a photocopy of an aerial photo of the area of the proposed place of use with notations in red, yellow and black ink, was admitted without objection.

Regarding Objector/Carey proposed Exhibit 20: Objector Twohy/Carey moved that the Hearing Examiner take administrative (judicial) notice of a DNRC technical report prepared by Forrest Tevebaugh in reference to Water Rights Applications 14965-g41E, 15228-c41E, 19279-c41E, and 19230-c41E by Thomas H. Boone, Trustee. The motion was taken under advisement. The Hearing Examiner hereby denies the motion. The Hearing Examiner will not take notice of said report as law for the same reasons given in the refusal to take administrative (judicial) notice of Applicants' Exhibit 4, nor take notice of said report as fact as it is not of sufficient notoriety to do so.

8 A copy of above-said report was then introduced as an exhibit proper. Admission was moved, objection received and the motion taken under advisement. The Hearing Examiner hereby denies admission of said report on the grounds that it is hearsay of the type which the reasonably prudent man would not rely on in the conduct of his serious affairs, absent the opportunity to cross examine the author, and because the author of the document was not present at the hearing.

8 Regarding Objector Twohy/Carey proposed Exhibit 21: Objector Twohy/Carey moved that the Hearing Examiner take administrative (judicial) notice of a DNRC technical report prepared by Glenn R. Smith and Ken Chrest in reference to Water Rights Applications 14965-g41E, 19228-c41E, 19229c41E and 19230-c41E by Thomas H. Boone,

Trustee. The motion was taken under advisement. The Hearing Examiner hereby denies the motion for the same reasons given in the refusal to take administrative notice of the report introduced as Objector Twohy/Carey Exhibit 20.

A copy of above-said report was then introduced as an exhibit proper. Admission was moved, objection received, and the motion taken under advisement. The Hearing Examiner hereby denies admission of said report on the grounds and for the reason that it is hearsay of the type which a reasonably prudent man would not rely on in the conduct of his serious affairs, absent the opportunity to cross-examine the author, and because neither of the authors of the document were present at the hearing.

Objector Twohy/Carey Exhibit 22, a large sheet containing calculations made at the hearing by Jim Beck, was admitted without objection.

There was no objection to any of the contents of the department file, and it thus is included in the record in its entirety.

#### Preliminary Matters

1. Objector Twohy/Carey's motion to certify pursuant to MCA §85-2-309(2) is hereby denied. See discussion infra at Conclusion of Law 4.

2. Objectors' argument that the department must, pursuant to the provisions of MCA §85-2-404 and 405, petition the District Court/Water Court to hear the issue of abandonment is specious. The cited abandonment provisions are intended to apply to existing

rights only after they have been determined in the statewide adjudication pursuant to the provisions of Title 85, Chapter 2, Part 2, and set forth in a final decree. See MCA §85-2-404(3); MCA §85-2-405(3). The Water Court has not yet issued a final decree in Basin 41E. Therefore, the department has no duty to petition.

3. The record was left open at the end of the hearing in this matter for the receipt of memoranda in closing. It was not left open for receipt of further evidence. Accordingly, the Affidavit of Tom Carey, untimely introduced by filing with the department on March 28, 1988, is not evidence of record, and will not be considered in deciding this case.

#### Findings of Fact

1. MCA §85-2-402 provides that "[a]n appropriator may not make a change in an appropriation right except as permitted under this section and with the approval of the department. . .".

2. This Application was duly filed on February 20, 1987.

3. The pertinent facts of the Application were published in the Boulder Monitor, a newspaper of general circulation in the area of the source, on March 19 and 26, 1987.

4. By this Application, Applicants seek to change the point of diversion and place of use of Claimed Water Right No. 41585-41E.

5. The Application received five timely objections.

a. From the Estates of Eve Twohy and William A. Twohy alleging that, by moving the point of diversion downstream, Applicants would benefit (to Objectors'

8 detriment) from supplemental flows, formerly unavailable to Dunks, and further alleging that the Dunks water right had been abandoned;

- b. From Stuart Lewin, Trustee, alleging abandonment;
- c. From Tom Carey Cattle Co. making the same allegations as set forth by Twohys;
- d. From Robert L. and Mary K. Anderson making the same allegations as set forth by Twohys; and
- e. From John Carey Ranch and Carey Brothers Partnership alleging that junior rights, using recharge to the Boulder from the Muskrat and the Little Boulder, would be adversely affected.

6. Statement of Claim of Existing Water Right No. 41585-41E as initially filed by William and Charlotte Dunks claimed 500 miners inches (12.5 cfs) up to 274 acre-feet per annum for flood irrigation of 100 acres located in Sections 30 and 31 of Township 6 North, Range 4 West, Jefferson County, Montana; historically diverted by ditch with headgate located in SE $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 30 Township 6 North, Range 4 West, Jefferson County, Montana, priority date August 19, 1882. Subsequently, the Water Court found in its Temporary Preliminary Decree that the flow rate was only 3.79 cfs, all other parameters being the same as claimed.

8 7. On February 20, 1987, subsequent to the issuance of the Temporary Preliminary Decree, Dunks entered into a stipulation with the DNRC whereby Dunks agreed that the historic flow rate was just 2.64 cfs and that only 65 acres were historically irrigated. In consideration of the filing of the stipulation with the Water Court,

DNRC agreed to withdraw its objection to the Temporary Preliminary Decree.

8. On February 23, 1987, Dunks sold Claimed Water Right No. 41585-41E to Emmett and Margy McCauley.

9. The Change Application proposes relocation of the point of diversion to the SW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 2, Township 4 North, Range 3 West, Jefferson County, Montana; and proposes a new place of use, to wit: 55 acres located in the NW $\frac{1}{4}$  of Section 7, and 10 acres located in the N $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 7, all in Township 4 North, Range 2 West, Jefferson County, Montana.

10. After the change, Applicants propose to divert only 1.32 cfs up to 191 acre-feet per year as measured at the new point of diversion. The remainder of the water right would be abandoned to compensate for stream loss, etc.

11. Historically, an estimated 50 percent of the amount of water diverted under the Dunks right rapidly returned to the Boulder River. This return flow was appropriated by downstream users. Under the proposed change, none of the water diverted would return to the Boulder River. (Testimony of James Beck.)

12. In the reach between the original point of diversion and the Boulder River bridge (this reach referred to hereafter as the "upper Boulder"), an estimated 15 percent of the water passing the original point of diversion is lost due to "natural streambed loss". There is no "natural streambed loss" between the Boulder River Bridge and the proposed point of diversion (this reach hereafter referred to as the "lower Boulder"). (Testimony of James Beck.)

13. The Boulder River often, during periods of low flow, appears dry in the reach near the Boulder River bridge, while simultaneously containing water both above and below the reach.

14. There are several diversions below Dunks' original point of diversion which remove a large percentage of water from the upper Boulder River. Very little of this water is returned to the upper Boulder.

15. Below the Boulder River bridge, several tributaries including Muskrat Creek enter the Boulder River, and sloughs and springs supply water to the Boulder River. There are no such accretions of water to the "upper Boulder". All Objectors hereto have points of diversion below the Boulder River bridge.

16. A substantial portion of the Muskrat Creek flow consists of return flow from irrigation north of the town of Boulder, which irrigation is accomplished with water diverted out of the "upper Boulder". Water is also diverted out of the "upper Boulder" for irrigation south of the Boulder River; this irrigation also generates return flows which enter the river below its confluence with the Muskrat. When the flow of the "upper Boulder" is low, Objectors rely on these return flows.

17. There is subsurface (beneath the streambed) flow in the reach of Boulder River near the Boulder River bridge. This flow is derived from upstream surface flow, and reappears just below the bridge in a swampy area. Therefore, even if the Boulder appears dry at the Boulder River bridge, it may still contain water.

The evidence shows that the river can contain at least 2.6 cfs with no visible flow. (Department file: Field Report.) Therefore,



8 if there is visible flow at the Boulder River bridge, the river must contain at least 2.6 cfs in that reach. This flow resurfaces just downstream from the bridge and becomes part of the surface flow, available for diversion thereafter.

18. Testimony shows that the capacity of the proposed means of diversion, the Wickham Ditch, is 1000 miner's inches at the point of diversion, narrowing to 600 miner inches; that there are presently other water rights carried by said ditch; and that these rights total 525 miner's inches. There is no headgate or measuring device on the Wickham Ditch.

19. No final decree has been issued for Basin 41E, the basin in which Claimed Water Right No. 41585-41E is located.

#### Conclusions of Law

8 1. The department has jurisdiction over the subject matter herein, and the parties herein.

2. The department gave proper notice of the hearing, and all relevant substantive and procedural requirements having been fulfilled, the matter is properly before the Hearing Examiner.

3. Section 85-2-402, MCA directs the department to approve a Change in Appropriation Right if the appropriator proves by substantial credible evidence that the following criteria are met:

- (a) The proposed use will not adversely affect the water rights of other persons or other planned uses or developments for which a permit has been issued or for which water has been reserved.



8 (b) The proposed means of diversion, construction, and operation of the appropriation works are adequate.

(c) The proposed use of water is a beneficial use.

4. William and Charlotte Dunks, prior to selling Claimed Water Right No. 41585-41E, stipulated that said water right was not as stated in the claim as originally filed, but differed from the original claim in that the flow rate was only 2.64 cfs and in that the total irrigated acreage was only 65 acres. (Finding of Fact 7.) Such a stipulation, filed with the Water Court, operates as an amendment to the initial claim. See Master's Report, Case No. 43BJ-77, Montana Water Courts, Yellowstone Division, November 6, 1987. Therefore, the Hearing Examiner hereby concludes that the Dunks claim a water right of 2.64 cfs up to 274 acre-feet per annum for use on 65 acres, all other parameters being the same as stated in the Statement of Claim as initially filed. (See Finding of Fact 6.)

8 A claim of existing water right constitutes prima facie proof of its content until issuance of the final decree. MCA §85-2-227. No final decree has yet been issued in Basin 41E. Therefore, the Dunks claim (as amended) stands as prima facie proof of its content. The department has no jurisdiction to adjudicate the existence or extent of a water right. See Title 85, Chapter 2, Part 2; see also U.S. v Montana Department of Natural Resources and Conservation, No. 50612 (Montana 1st District, June 15, 1987) Slip op. at 7. In department proceedings, therefore, absent contrary findings by the Water Court (pursuant to certification), Dunks' amended claim is unassailable

proof of its content.<sup>1</sup>

Regarding certification, MCA §85-2-309(2) allows the department the discretion to certify issues of claim accuracy to the Water Court. However, as all contested cases involve claimed water rights, and because certification of all contested rights would be unduly burdensome, and because all change authorizations are made subject to final determination of the underlying water rights by the Water Court, the department will only certify an issue if the case before it can not be argued without a prior determination by the Water Court, e.g., when the applicant and an objector both claim ownership of the underlying water right, or if the content of the claim itself belies the existence of a valid water right. The instant case does not involve issues of that nature. Therefore, for the purposes of this proceeding, the Dunks claim, as amended by stipulation of February 20, 1987, proves the existence and extent of Water Right No. 41585-41E.

5. Irrigation is a beneficial use of water. MCA§85-2-102(2)(a).

6. The proposed means of diversion, construction and operation of the appropriation works are adequate.

The Wickham Ditch will convey up to 600 miner inches of water to the proposed point of diversion. Other water rights on the ditch total 525 miner inches. (Finding of Fact 15.) As Applicants would

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<sup>1</sup>The department can not unilaterally adopt the water right parameters which are set forth in the Temporary Preliminary Decree because only the final decree, or a certification determination, overcomes the prima facie effect of the claim. MCA §85-2-221; MCA §85-2-309(2)(a).

only be allowed to divert 1.12 cfs, i.e., about 45 miner's inches (see Conclusion of Law 9 infra), the ditch would at most be required to carry a maximum of 570 miner's inches, less than its capacity. The proposed means of diversion is thus physically adequate to convey the water to the pump and pipeline. The use of a ditch, coupled with pump and pipeline, to convey irrigation water is reasonable and customary.

7. Elimination of return flow does not necessarily constitute adverse effect to junior appropriators.

Although it has been held that an appropriator may not change the place of use of his water so as to deprive subsequent users of the return flow generated by its use, Gassert v. Noyes, 18 Mont. 216 (1896), the holding does not stand for the proposition that all changes which alter or halt return flow are prevented as a matter of law<sup>2</sup>; rather, the rule reflected is that that an appropriator may not make changes which would adversely affect the water rights of other appropriators. The ultimate test of whether other appropriators will be adversely affected by a change is whether it increases the burden on the source. Quigley v. McIntosh, 110 Mont. 495 (1940), Head v. Hale, 38 Mont. 302 (1902); Featherman v. Hennessey, 43 Mont. 310 (1911).

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<sup>2</sup>Witness the fact that an appropriator is free to simply discontinue the use of his water, and leave all waters, including those which ultimately generate return flows, undiverted. If diversion is halted, there is no return flow. Of course, the water remaining undiverted nevertheless continues to benefit other appropriators.

8 While elimination of return flow to the source may increase the burden on the source, whether it will increase the burden is a question of fact which can only be answered based on the circumstances surrounding a particular case. Thus, in the instant case the evidence must be weighed with an eye to answering that question.

8 8. The evidence shows that historically 50 percent of the Dunks diversion was quickly returned to the Boulder River; that downstream appropriators relied on such flows; and that such flows will be eliminated under the proposed changes. However, the elimination of return flows will not increase the burden on the source if the equivalent amount simply remains undiverted; that is, Objectors will have no less water at their disposal than before the change if 50 percent of the Dunks water remains undiverted. Accordingly, so long as the Change Authorization prevents diversion of 50 percent of the Dunks right, there will be no adverse effect to Objectors due to elimination of return flows.

9. Approximately 15 percent of the flow of the Boulder River is depleted due to "natural streambed loss" in the reach between the original Dunks point of diversion and the Boulder River bridge; but there is no "natural streambed" loss below the bridge. (Finding of Fact 12.) Thus, assuming no diversion of the Dunks water by intermediate appropriators, 85 percent of the water claimed by Dunks would arrive at the new point of diversion.

8 As has been stated supra, in order to prevent adverse effect to Objectors due to loss of return flow, the portion of Dunks water which was formerly unconsumed (return flow) must, under the change,

8 remain undiverted. See Conclusion of Law 8. However, because only 85 percent of the Dunks water will reach the new point of diversion, Applicants could only be allowed to divert 85 percent of the amount formerly consumed. Accordingly, were the Authorization granted, Applicants could only be authorized to divert 42.5 percent of the (amended) claimed Dunks water, i.e., 1.12 cfs up to 116.5 acre-feet per annum.

10. The principle allegation of adverse effect by all objectors hereto (who appeared at the hearing) as set forth on their objection forms is that, by moving their point of diversion downstream, Applicants would be able to use their senior priority date to obtain water which enters the river downstream from the original Dunks point of diversion and which was thus historically available to Objectors but unavailable to Dunks.

8 Objectors point out that, during periods of low Boulder River flow, there is no visible flow in the reach near the Boulder River bridge, and evidence given at the hearing shows that the Boulder River can appear nearly dry at the Boulder River bridge, while simultaneously the river contains water at Dunks' original point of diversion, as well as downstream from the bridge. (Finding of Fact 13.) Accordingly, Objectors argue that, even if all the water which Dunks claim to have diverted at the old point of diversion is allowed to pass said point undiverted (as it would under the change proposed), little or none of it would make it past the Boulder River bridge, and that Applicants therefore would, by diverting at the new point of diversion, be taking water which they could not historically have obtained.

Verily, when there is no water at the Boulder River bridge (the low spot in the river between the old and new points of diversion), then ipso facto any diversion by Applicants at the new point of diversion is diversion of water which Dunks could not formerly have obtained. Indeed, even if there were water at the bridge, it is still not certain whether Applicants would be diverting water which Dunks could formerly have obtained, for water flowing by the Boulder River bridge could be destined to supply an appropriator with a water right senior to Dunks. Just because the Dunks water would not be diverted at the original point of diversion is not a guarantee that such water will arrive at the new point of diversion. Therefore, and because there are downstream accretions to the Boulder River flow, the proposed change in point of diversion could easily result in the Applicants diverting water which was historically unavailable to Dunks.<sup>3</sup>

11. Any exercise of the Dunks senior right to obtain flows, historically available only to the juniors, would constitute an enlargement of the appropriation, i.e., Applicants could divert when Dunks historically could not have. Such an enlargement would alter

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<sup>3</sup>A comparison of the proposed change with a hypothetical simple change in place of use will serve to illustrate. If Applicants had not proposed a change in point of diversion, but instead were to keep the original point of diversion and, instead of utilizing the Boulder River as a carrier, were to utilize a separate carrier beginning at the original point of diversion (e.g., a private ditch which ran from the old point of diversion to the new place of use) either lack of water at the headgate or a call by senior appropriators downstream from the point of diversion would dry up



stream conditions to the detriment of junior appropriators. See, e.g., Whitcomb v. Helena Water Works Co., 151 Mont. 443, P.2d 301 (1968); Quigley v. McIntosh supra. Accordingly, a Change Authorization may not issue unless it can be conditioned so that Applicants cannot divert water which was formerly unavailable to the Dunks.

12. Historically, Dunks could divert only when sufficient water was present at the original point of diversion to physically allow diversion, and then only if no call had been made on this right by a downstream senior appropriator. In other words, even if there were sufficient water physically present at the original point of diversion, Dunks could only divert if no downstream senior required the water which the Dunks otherwise have a right to take (hereafter referred to as the "Dunks water"). Plainly, these two factors controlled when the Dunks could divert.

If the point of diversion is moved downstream as herein proposed, the above-named factors would similarly control whether the Dunks water will be available at the new point of diversion.

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the ditch. Thus, if there was no water at the headgate, or if seniors downstream from the point of diversion legitimately called for water, Dunks' right could not be filled (just as before the change.) However, such is not necessarily the case when the carrier is not insulated from other supplies of water, i.e., when the carrier is the source itself.

If the point of diversion is moved downstream as proposed, i.e., the Boulder River is used as carrier, the carrier will not simply dry up as in the above example, thereby automatically depriving Applicants of the Dunks water. Rather, it will contain other waters including return flows, as well as natural accretions from springs, creeks, etc., entering in the same reach (Finding of Fact 14, 15). In other words, the carrier will contain water which historically Dunks could not obtain.

8 However, once the point of diversion is moved downstream, senior appropriators with points of diversion between the original Dunks point of diversion and the new point of diversion will no longer need to call for the "Dunks water"; they will simply divert it. Because of this fact, neither Applicants nor anyone else will know whether the "Dunks water" is being diverted by those seniors. If, due to this fact, Applicants divert while the "Dunks water" is rightfully being diverted by a senior appropriator, Applicants will perforce be appropriating water which Dunks historically could not have obtained. (The Dunks would have been called and shut down by that senior so that he could obtain the "Dunks water".)

8 While the first limiting fact would be simple enough to incorporate in the Authorization by conditioning it so that Applicant could not divert unless there was sufficient water at the original point of diversion to allow diversion there, the Hearing Examiner can conceive of no mechanism which would allow anyone to discern whether the "Dunks water" is being rightfully diverted by a senior appropriator with a point of diversion between the original Dunks point of diversion and the proposed point of diversion. Accordingly, no condition fully protective of water formerly unavailable to Dunks can be imposed, and absent such condition there is a high probability of adverse effect to the Objectors' water rights. Therefore, the Authorization must be denied.

8 WHEREFORE, based on the foregoing proposed Findings of Fact and Conclusions of Law and the record and file in this matter, the Hearing Examiner proposes the following:



ORDER

That Authorization to Change Appropriation Water Right No. G41585-41E be denied.

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th Ave., Helena, MT 59620-2301); the exceptions must be filed within 20 days after the proposal is served upon the party. MCA §2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.


Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Division Administrator. A request for oral argument must be made in writing and be filed with the Hearing Examiner within 20 days after service of the proposal upon the party. MCA §2-4-621(1). Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

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Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce new evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

DONE this 14 day of July, 1988.

  
Robert H. Scott, Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 E. 6th Avenue  
Helena, Montana 59620-2301  
(406) 444 - 6625

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing PROPOSAL FOR DECISION was duly served by mail upon all parties of record at their address or addresses this 14th day of July, 1988, as follows:

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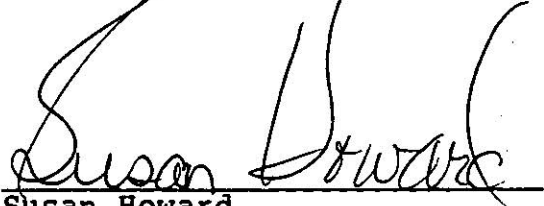
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